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# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a Corporation,
*Petitioner,*

vs.

EPIMENIO MORENO and ROQUE ARANDA,
*Respondents.*

## Respondents' Brief

On Writ of Certiorari to the Supreme Court of the State of California

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**The Moreno Case**

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# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

SOUTHERN PACIFIC COMPANY, a Corporation, *Petitioner,*

vs.

EPIMENIO MORENO and ROQUE ARANDA, *Respondents.*

## Respondents' Brief

On Writ of Certiorari to the Supreme Court of the State of California

*To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

## I. THE MORENO CASE

### THE QUESTION PRESENTED

**A. Does the Federal Employers' Liability Act (45 U.S.C. 51) Apply to a Railroad Section Hand Engaged in Helping Construct a Substitute Yard for Switching and Classifying Trains on a Major Railroad Artery of Interstate Commerce?**

### STATEMENT OF FACTS

In April, 1951, Petitioner, a common carrier of freight and passengers by rail in interstate commerce commenced

construction at Roseville, California, of what is known as a retarder yard (Tr. 255). A main interstate rail line of Petitioner runs from Oakland, California, through Roseville, California, and on to points as far east as Ogden, Utah, with connections to Chicago and New York (Tr. 256). The purpose of the retarder yard was to effect a change over to gravity switching of freight cars from the previously existing method of switching by use of switch engines (Tr. 255). The new method was an improvement over the existing method of switching, and effected an economy in operations (Tr. 256). In order to construct the retarder yard, the existing artery of interstate commerce used by Petitioner had to be re-routed (Tr. 257). The new tracks in the retarder yard were constructed in part from old cross-ties from the old main line (Tr. 284-85). Removal of the old main line was commenced about October 1, 1951 (Tr. 257). The relocation of the main line and the construction of the retarder yard constituted one integrated project (Tr. 257). The alteration of the main line was completed in November, 1951, but it had been in use on a restricted basis prior to its completion (Tr. 258).

The term "retarder yard" is applied to the entire project, including the receiving yard, classification yard, and the departure yard (Tr. 263-279). The receiving yard was completed by August, 1951, and during that month was put into operation as a switching yard (Tr. 278).

On October 2, 1951, Respondent, Epimenio Moreno, approached a timekeeper of Petitioner at Rocklin, California, seeking employment. The timekeeper gave Respondent a paper and sent him to Sacramento, where after presentation of it to the proper official, he was employed as a laborer and sent forthwith to Roseville, California, for work on the retarder yard (Tr. 283-84). Among the first tasks of Re-

spondent was that of helping remove cross-ties from the old main line (Tr. 284). Some of these he and his fellow workers would burn, and others they used in the construction of the new yard (Tr. 285-86).

While working on the retarder yard Respondent lived in "outfit" cars belonging to Petitioner. These cars were stationed on a company side-track near Rocklin, California (Tr. 289).

On December 19, 1951, Respondent received an injury to his foot when Respondent's crane operator allowed a rail to drop upon it (Tr. 288). As a result of his injuries, Respondent brought an action under the Federal Employer's Liability Act (45 U.S.C. 51). The issue of the applicability of the Act was heard before the trial court without a jury. The decision of that court was that the case was properly brought, and thereafter upon a trial on the merits before a jury a verdict for plaintiff-respondent in the sum of $5,000.00 was returned (Tr. 248). The trial court granted judgment for the railroad n.o.v. upon the ground that no negligence on its part was shown (Tr. 249).

Upon appeal to the Supreme Court of California, the judgment n.o.v. was reversed, and the verdict for plaintiff-respondent ordered reinstated (Tr. 299).

## ARGUMENT

### I. The Federal Employers' Liability Act (45 USC 51) Applies to a Railroad Section Hand Engaged in Helping Construct a Substitute Yard for Switching and Classifying Railroad Cars on a Major Railroad Artery of Interstate Commerce.

#### A. THE ACT IN QUESTION.

The pertinent section of the Act involved in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be in the furtherance of inter-

> state or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this act." 53 Stat. 1404, 1939.

Thus, an employee may invoke the Act if any part of his duties (1) furthers interstate commerce or, (2) directly or closely and substantially affects such commerce.

**B. PURPOSES OF THE ACT.**

Prior to 1939, the Federal Employers' Liability Act covered only those employees of a carrier who, at the "moment of injury" were engaged in interstate commerce or work so closely related thereto that it was practically a part thereof. 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. In order to eliminate such confusion Congress, in 1939, amended the Act to eliminate the "moment of injury test." Congress intended to extend the coverage of the act to borderline railroad occupations. 10 ALR 2d 1282-1283; *Edwards v. Baltimore & Ohio R. Co.*, 131 F 2d 366; *McLeod v. Threlkeld*, 319 U.S. 491; *Southern Pacific Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act is now almost all-inclusive. *Taylor v. Limaghi Coal Co.*, 352 Mo. 1212, 181 S.W. 2d 536; *Wright v. N. Y. Cent. R. Co.*, 263 App. Div. 461, 33 N.Y. Supp. 531, Cert. denied 317 U.S. 668. In order to effectuate the purposes of the Act the Courts should give it a liberal interpretation in favor of its application to any given case. *Ermin v. Penn. R. Co.*, 36 F Supp. 936; *Lewis v. Ind. Acc. Com.*, 19 Cal. 2d 284.

The report of the Senate Judiciary Committee dealing with the purpose of the 1939 Amendment had this to say:

> "The Adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act." (Senate Rep. No. 661, June 22, 1939.)

It is significant that the employee's duties at the time of his injury is stated to be the controlling test. Congress evidently assumed that if the activity of the employee "directly, closely, or substantially" affected interstate commerce, his employer would likewise be engaged in such activity. This seems reasonable since the act of the employee in the course and scope of his employment is of necessity the act of his employer. This is the essence of the master-servant relationship.

Petitioner assumes that in order for an employee to be protected by the Act, his employer, at the time of the injury, must be engaged in "interstate transportation or work so closely connected with it as to be a part of it" (Petitioner's Brief Page 107). They do not tell us how close the activity must be to transportation before it is close enough to be a part of it. In fact, they give us no clear distinction between "transportation" and "commerce." We see no reason to strike from the Act the words "interstate commerce" as used by Congress, and substitute therefore more restrictive words such as "interstate transportation."

We shall make no effort to answer the bulk of the historical argument made by Petitioner. While we believe that all

of the cases now before the court are covered by the Federal Employers' Liability Act as amended, we do not believe our two cases, *Moreno* and *Aranda*, involve new construction or any other activity not traditionally covered by that Act. It is true that the Supreme Court of California stated in its opinion in the *Moreno* case that the construction was new, but the transcript of the trial showing the nature of the work is before this court for review. The transcript should govern.

**C. THE FACTS APPLIED TO THE CASES AT BAR.**

**(1) The Moreno Case.**

Moreno was a section hand, an occupation as typically railroading as being a conductor on a limited express or a switchman on a freight. Maintenance and improvement of an existing highway of interstate commerce was an activity covered by the Act even prior to the 1939 Amendment. *Pedersen v. Delaware Etc. R. Co.*, 229 U.S. 146. In the *Pedersen* case this court said:

> "* * * the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and legal effect a part of it."

We believe that the record clearly shows that Moreno was repairing, maintaining and improving an existing instrumentality of interstate commerce. The retarder yard upon which he was working was an integrated project consisting of a receiving yard, a classification yard, and a departure yard (Tr. 263-279). In connection with the construction of these yards the existing main line of the railroad had to be relocated (Tr. 257). It is significant that the relocation of the main line, a project upon which Respondent worked, was completed in November, 1951, and Respondent was not injured until December 19, 1951. Thus, when he was injured,

this part of the project was in full use as a highway of interstate commerce.

The receiving yard was completed and put into use as a switching yard in August, 1951, prior to the employment of Respondent.

There can be no doubt that if Moreno had been injured on December 19, 1951; on the new main line which was then in use as a highway of interstate commerce he would have been covered by the Act. Likewise, if he had been injured on that date while employed in the part of the retarder yard known as the receiving yard he would have been covered, since this part of the retarder yard had been in use for switching interstate trains since August, 1951. Could it be that Moreno's rights are to be made to depend upon in which part of the retarder yard he received his injury?

The retarder yard represented nothing more than an effort of Petitioner to improve an existing method of performing an interstate function. The testimony of Mr. William F. Turner, Construction Division Engineer of the railroad is as follows on this point:

> "Mr. Colley: Do you have knowledge as to the purpose of the project?
>
> Mr. Turner: Well, the purpose is to speed up the classification of cars and certain economies to be effected.
>
> Mr. Colley: In other words, the purpose of the project, then, stated another way is to better facilitate the movements of the Southern Pacific Company's trains?
>
> Mr. Turner: Freight trains, yes.
>
> Mr. Colley: Freight trains?
>
> Mr. Turner: Freight trains.
>
> Mr. Colley: These freight trains whose movements this project is intended to facilitate come from over all lines?
>
> Mr. Turner: Yes, they come from all over.

Mr. Colley: When I refer to all over lines, I have reference to out of State, for instance.

Mr. Turner: Yes, they come from the east.

Mr. Colley: When you say 'east' just where do you have in mind?

Mr. Turner: Well, they come from anywhere in the east, Ogden, Chicago, New York.

Mr. Colley: You mean Ogden, Utah, Chicago, Illinois, and New York, New York?

Mr. Turner: Yes, and many other places."

Thus, it is clear that any company employee, including Respondent, who helped construct the project was engaged in an activity which furthered interstate commerce since the purpose of the project was to facilitate switching operations of freight trains operating in interstate commerce.

**(2) Was Respondent, as a section hand, engaged in an activity which closely, directly or substantially affects interstate commerce?**

Respondent and his fellow employees tore up the old main line in the area of the new retarder yard and laid a new one. The very day of his injury Respondent was engaged in helping lay a track which used cross-ties from the old main line as well as some new ones. In essence, he was repairing the tracks. The cases quite uniformly hold that repair activities are covered by the Act. *Shelton v. Thomson*, 148 F2d 1; *Zimmerman v. Scandrett*, 57 F. Supp. 799; *Mills v. Terminal R. Assn.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 Pac. 2d 342; *Marie v. Gulf M. & O. R. Co.*, 219 S.W. 322; *Lewis v. I.A.C.*, 19 Cal. 2d 284.

It is also significant that Moreno and the other members of his section gang were provided with living quarters by the railroad in outfit cars along its regular rail line.

We submit that even in the unlikely event that this court should decide that "new construction" is not covered by the

Act, the judgment in the Moreno case should be affirmed. This is not to say that we believe the so-called "new construction" test has any validity. We simply do not feel that Moreno was engaged in wholly new construction.

# I. ARANDA V. SOUTHERN PACIFIC COMPANY

## THE QUESTION PRESENTED

**A. Does the Federal Employers' Liability Act (45 U.S.C. 51) Apply to an Employee of an Interstate Common Carrier by Rail Injured While Remolding Train Wheels Which Have Been Worn Out in Use on Interstate Trains?**

## STATEMENT OF FACTS

The Petitioner, Southern Pacific Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do and engaged in doing business as a common carrier of passengers and freight for hire in the State of California and other states.

At Sacramento, California, Respondent owns and maintains various tracks, switching yards, store houses, and repair facilities for trains operated in interstate commerce, an iron foundry, a brass foundry, a wheel foundry, and passenger and freight stations.

Since the year 1939, Respondent, Roque Aranda, has been employed by Petitioner as a wheel molder in its wheel foundry in Sacramento, California (Tr. 352). As such molder, he assisted in the remolding of cast iron wheels. These wheels are remolded from old wheels removed from freight cars operating in interstate commerce. The old wheels which provide the metal for the wheel foundry at Sacramento may come from anywhere on Petitioner's lines, which lines extend from Sacramento, California, north to Portland, Ore-

gon, northeast to Ogden, Utah, southeast to El Paso, Texas, south to the Mexican border, and west to San Francisco, California (Tr. 333). Thus, for example, when a wheel is worn out in Portland, Oregon, Ogden, Utah, or El Paso, Texas, it is shipped by one of Petitioner's interstate trains to the Sacramento foundry for "repair", the "repair" process being one of remolding the wheel (Tr. 333, 348).

The old wheels removed from freight cars (because they are no longer serviceable) are delivered to the foundry by means of flat cars upon which they have been loaded. The flat cars come to the Sacramento wheel foundry from various sources both within and from outside the State of California. When the wheels have been remolded at Sacramento, California, some of them are sent on flat cars directly to Ogden, Utah, and Portland, Oregon, where axles are affixed to the wheels (Tr. 330). Others are hauled by means of a straddle truck to the stores department of Petitioner to be stored for use as the need arises. Petitioner maintains a spur track directly connecting its foundry with its main track leading to Portland, Oregon, and other similar centers (Tr. 330).

Upon completion of the assembly of the axle unit in Portland or Ogden the wheel and axle are returned by the interstate railroad of Petitioner to its Sacramento, California repair shop. Here it is fitted upon trains as needed, some going on entirely new cars being assembled in Sacramento by Petitioner, and others being placed upon old cars as repairs. The repaired cars go wherever the need arises, be it Roseville, California, or El Paso, Texas, and or points in between (Tr. 331).

The Petitioner and the industry in general knows of no feasible way of repairing used or worn cast iron wheels except to remold them. Petitioner conducts its remolding

process at its Sacramento, California, wheel foundry where approximately 84% of all wheels used on its freight trains are remolded from old wheels (Tr. 333).

On the 12th day of June, 1950, Respondent was severely burned by molten metal while preparing to pour it into a mold at Petitioner's Sacramento wheel foundry.

## ARGUMENT

### The Federal Employers' Liability Act (45 USC 51) Applies to an Employee of an Interstate Common Carrier by Rail Injured While Remolding Train Wheels Which Have Been Worn Out in Use on Interstate Trains.

The pertinent section of the Act as amended in 1939, applicable in this case reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way, directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act." 53 Stat. 1404, 1939.

Thus, it appears that an employee may invoke the act if any part of his duties (1) further interstate or foreign commerce (2) or directly or closely and substantially affect such commerce.

Prior to the 1939 Amendment, the Federal Employers' Liability Act covered only those employees of a carrier who, at the moment of their injury, were engaged in interstate commerce or work so closely related thereto as to be practically a part of such commerce. See 10 ALR 1184 and cases cited. This led to much confusion as to when an employee was and when he was not in interstate commerce. Thus, Congress amended the Act in 1939 to end

the confusion resulting from the efforts of courts to apply the strict "moment of injury" test to every case. 10 ALR 2d 1282-1283; *Edwards v. Baltimore & Ohio R. Co.*, 131 F.2d 366; *McLeod v. Threlkeld*, 219 U.S. 491, 87 L.ed 1538, 63 S.Ct. 1248; *Southern Pac. Co. v. Ind. Acc. Com.*, 19 Cal. 2d 271.

The Act as amended in 1939 is now almost all inclusive, and fine distinctions are no longer necessary. Prior to the amendment, many cases turned upon some slight differentiation in duty or operation, more apparent, than real, with much hair splitting and little certainty. Thus, it was to avoid all this and to give a fixity of application that Congress amended this Act to include any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce. See *Wright v. New York Cent. R. Co.*, 263 App. Div. 461, 33 NYS 2d 531, cert. den., 317 U.S. 668. See also *Taylor v. Lumaghi Coal Co.*, 353 Mo. 1212, 181 S.W. 2d 536, for similar direct furtherance of interstate work concept.

In the principal case the Respondent's duties as a molder of wheels caused him to further interstate commerce. Practically every one of Petitioner's interstate freight trains run on wheels made in its Sacramento wheel foundry (Tr. 333) (proceedings pp. 16, 17). Thus, not only is interstate commerce furthered by the duties of Petitioner, it is made possible by such duties. As one learned Court profoundly observed, no train may run without wheels, even in interstate commerce. *Shelton v. Thomson*, 148 Fed. 2d 1. In the *Shelton* case, the Plaintiff was employed to operate a crane used in lifting train wheels in a repair shop. The Act was held to apply to him.

Surely, without the operations performed by Respondent and others in Petitioner's foundry at Sacramento, its repair

shop activities at Portland, Oregon, and other places would be paralyzed.

Petitioner attempts to make a distinction between "manufacturing" and "commerce". In arriving at a decision in the case at bar the Court need not draw any such line between that which is manufacturing and that which is commerce. The applicable law makes the Petitioner liable if (1) any part of Respondent's duties further interstate commerce, or (2) any part of his duties substantially or closely affect such commerce. Thus, if we assume, for purposes of argument only, that Respondent was on the date of the accident engaged in manufacturing or production, the Petitioner is liable just the same.

The Courts make no apparent effort to distinguish between manufacturing and commerce. Thus, a blacksmith's helper engaged in making new strap hangers to be used by Defendant interstate railroad as replacement parts for its trains has been held to be covered by the Act. *Trucco v. Erie R. Co.*, 45 A.2d 20, Cert. denied 328 U.S. 843. Also, an employee running a forging machine for manufacturing small new parts for trains withdrawn from interstate commerce also has been held to be protected by the Act. *Baird v. N. Y. Cent. R. Co.*, 86 N.E. 2d 567.

Petitioner seeks also to suggest that the Act has no application to "new" construction but from the foregoing paragraph it may be seen that if an employee making new strap hangers as replacement parts for interstate trains, and one who makes new parts on a forging machine are protected by the Act, there is no method of reasoning by which Petitioner may successfully exclude Respondent. Could it be that new strap hangers for trains further interstate commerce or more substantially affect such commerce than train wheels? Most trains could probably run in inter-

state commerce without strap hangers, but few if any, could run without wheels. Moreover, the true test of the applicability of the Act is its effect upon or furtherance of interstate commerce, and is unrelated to whether the particular employment involves new or old construction. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726; *Mo. Pac. R. Co. v. Fisher*, 177 S.W. 2d 725; *St. Louis-S. F. Ry. v. Wacaster*, 199 S.W. 2d 948; *Wright v. N. Y. Cent. Ry. Co.*, 33 N. Y. Supp. 2d 531. In the *Wacaster* case and the *Agostino* case the employee was held to be within the coverage of the Act, even though in each he was engaged in new construction. The case of *Moser v. Union Pac. R. Co.*, 65 Idaho 479, 147 Pac. 2d 336, reaches a contrary result, but it is submitted that the theory of the *Moser* case is that the Act should be strictly applied, and is therefore in direct conflict with the authorities cited above. (For a case indicating a liberal interpretation of the Act, see *Erickson v. Southern Pac. Co.*, 39 Cal. 2d 374.

It should be borne in mind that all of Petitioner's activities are handled under one parental roof and it is not a corporation solely engaged in the remolding of car wheels. Here the whole chain of activity started with the taking off of the old car wheels, which were worn out, the transferring of those old car wheels into a furnace where they are melted down, the pouring of this new melted material into remolding units, the creation of the remolded car wheel, the affixing of the axles and the subsequent attaching of those axles and car wheels to freight cars operating in interstate commerce. Surely, this is to be treated as one single operation for all practical purposes and all under the general control of Petitioner in a manner obviously directly and substantially affecting interstate commerce.

Further, assuming without admitting the necessity for showing Petitioner's activity at the wheel foundry to be one of "repair" rather than "manufacturing" to being this case at bar within the terms of the Act, it seems to be self-evident that no wheel can be "manufactured" until some car needs "repair". The foregoing statement is extremely pertinent here in view of the fact that no molten material can exist without the prior existence of the worn out wheels. Without the first worn out wheel there can be no creation of the new molten material. The mere fact that many of the wheels are stockpiled for a period does not break the chain of causality between the creation of the remolded wheels and their running on interstate railroad tracks, since it is the need for "repairs" which furnishes the material for the start of the so-called "manufacture". The entire procedure of remolding looks forward to and is created for the purpose of repairing the freight cars which have wheels in need of repair.

The duty of Respondent is nothing more than to repair one of Petitioner's instrumentalities of interstate commerce, temporarily withdrawn from such commerce, so that it may be returned to the commerce from which it has been temporarily withdrawn. The only way to repair a worn cast iron freight train wheel is to melt it down and remold it. Petitioner's foundry is essentially a repair shop, and the cases quite uniformly hold that repair shop activities are covered by the Federal Employers' Liability Act, *Shelton, v. Thomson*, 148 Fed. 2d 1; *Zimmerman v. Scandrett*, 57 F. Supp. 799; *Mills v. Terminal R. Assn.*, 205 S.W. 2d 942; *Harris v. Mo. Pac. R. Co.*, 149 P.2d 343; *Davis v. Gulf M. & O. R. Co.*, 219 S.W. 322; 10 ALR 2d 1273; *Lewis v. Ind. Acc. Com.*, 49 Cal. 2d 284.

## CONCLUSION

It is submitted that in both the *Moreno* case and the *Aranda* case what we have is really repair and maintenance activity. In one instance worn out train wheels were being repaired. In the other an existing method of switching and classifying railroad cars was being improved. The judgments should be affirmed.

Respectfully submitted,

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